LOS ANGELES BAR BULLETIN

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Vol. 26 MARCH, 1951 No. 7

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Vol. 26 MARCH, 1951 No. 7

PRESIDENT'S PAGE

H. F. Selvin

TO ONE who has observed at close quarters the work of Dana Latham as President of our Association, the opportunity to spread on the record a well-merited word of praise cannot be permitted to go by. His administration has not been without its problems—some of them highly controversial in nature. It has been the outstanding characteristic of his leadership that those problems were not evaded; that a positive position was taken when it was right that the official view of the Association should be known; and that the less controversial, and certainly the personally more comfortable, course of ignoring a hotly disputed question was not followed.

It was also due largely, if not entirely, to his efforts that the Association's constitution has been amended so as to permit us to resume the lawyer's traditional role of leadership in public affairs of great moment. Heretofore, it has been an easy route of escape when non-political public questions arose, upon which reasonable persons could and did differ, to say that the Association was limited to affairs of strictly professional import. That excuse will no longer serve; and under the constitutional amendment which Dana fostered, it has now been made possible for us to act as an association of citizens, as well as one of lawyers.

For many years the question of an Association headquarters, combining with the housing of our full-time staff facilities for social intercourse among our members, has been discussed. At Dana Latham's insistence and under his wise guidance that project is now so far advanced that a specific and detailed plan for its accomplishment will soon be submitted for the approval of the

membership. Lest fears be unduly excited, I hasten to add that no commitments have been made; and none will be made without an approval by a proportion of our members sufficiently large to assure the project's success. The important fact, and the reason for mention of the subject here, is that the project was first taken out of the realm of talk and lifted into the field of concrete planning and action by our recently retired President.

There is much more in the way of commendation which could be said. Enough has been written, however, to indicate that your present President is listed among those many of our members who agree in their respect for and appreciation of the devoted service which Dana has rendered the Association. I speak, I am sure, for the Association as a whole when I say to him, "Well Done."

HERMAN F. SELVIN.

LANGUAGE FROM THE SUPREME COURT

Mr. Justice Jackson concurring in the result in the case of *Eugene Dennis v. U. S.*, March 27, 1950, wherein a conviction was sustained by the Supreme Court, said:

"I adhere with increasing conviction to my dissent in Frazier v. United States, *supra*, at 514. The Court there dug a pit dangerous for civil liberties. The right to fair trial is the right that stands guardian over all other rights. Reference to the reports will show what otherwise one would not believe: that the Court, by a bare majority, held it to be entirely fair to try a person before a jury consisting solely of government employees, plus the fact that one juror and the wife of another worked in the office of the department head responsible for enforcement of the law charged to be violated. The common instinct of men for fair dealing and the experience of trial lawyers alike reject this holding. Whenever any majority can be mustered to overrule that weird and misguided decision, I shall be one of it.

"But the way for the Court to get out of the hole it fell into with Frazier is not to dig another and worse one."—J. L. M.

DECLARATORY RELIEF

SOME PRACTICAL ASPECTS OF DECLARATORY RELIEF IN CALIFORNIA

By Louis Licht*

Louis Licht

THE declaratory action was practically unknown in the United States thirty years ago. Today, it is in general use. In California, the statutory basis of declaratory relief is C. C. P. 1060, which reads in part as follows:

> ". . . Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a water course, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of a question of construction or validity arising under such instrument or contract. . . ."

The historic purpose of declaratory relief is to extend the scope of court protection in advance of harm and to forestall rather than merely repair damage. A declaratory judgment also makes it possible for either party to a controversy to obtain a legal adjudication of his rights prior to any breach of duty and thus avoid the bitterness and side issues which inevitably mark the trial of the ordinary lawsuit.

A concise statement of the purpose of declaratory relief is set forth in the case of *Jackson v. Lacey*, 37 Cal. App. 2d 551, 561:

> "Declaratory relief has for its purpose an eclaircissement or a liquidation of doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation."

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*Attended U. C. L. A. and Southwestern University Law School. Enlisted in the Army Air Force just after Pearl Harbor and just prior to graduation from Law School; completed law studies while in the Service, and took bar examination while on a fourteen-day furlough. Member of California State Bar. Engaged in private practice.

And in *Maguire v. Hibernia S. & L. Society*, 23 Cal. 2d 719, 729, the court said:

> "The purpose of a declaratory judgment is 'to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.'"

PARTICULAR APPLICATION OF DECLARATORY RELIEF

The remedy of declaratory relief is usually invoked in connection with the validity, enforceability, meaning, or construction of written instruments. For instance, a declaratory action may be invoked (a) to test the constitutionality of a statute,[1] or (b) to test the validity of a zoning ordinance,[2] or (c) to interpret a city charter,[3] or (d) to test the enforceability of covenants or servitudes or restrictive provisions of a deed,[4] or (e) to interpret an insurance policy,[5] a lease of real property,[6] a homestead declaration,[7] a deed of trust,[8] or a will.[9] So also the status of one claiming membership in a corporation may properly be determined by a declaratory judgment.[10]

While written instruments are most frequently involved in declaratory actions, relief may be claimed by one who seeks a determination of his rights or duties in respect of personal property,[11] corporation stock,[12] or water rights.[13] Oral contracts,[14] contracts which are partly written and partly oral,[15] and oral trusts[16] are properly subjects for declaratory relief.

SUFFICIENCY OF COMPLAINT FOR DECLARATORY RELIEF

A complaint for declaratory relief is legally sufficient if it sets forth facts which show the existence of an actual contro-

(Continued on page 274)

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[1] *Monahan v. Dept. of Water and Power*, 48 Cal. App. 2d 746, 750; 120 P. 2d 730.
[2] *Jones v. Robertson*, 79 Cal. App. 2d 813; 180 P. 2d 929.
[3] *Hoyt v. Civil Service Comm.*, 21 Cal. 2d 399; 132 P. 2d 804, 807.
[4] *Marra v. Aetna Const. Co.*, 15 Cal. 2d 375; 101 P. 2d 490.
[5] *Frasch v. London and Lancashire Fire Ins. Co.*, 213 Cal. 219; 2 P. 2d 147.
[6] *Lane Mortgage Co. v. Crenshaw*, 93 Cal. App. 411; 259 Pac. 672.
[7] *Phelps v. Loop*, 53 Cal. App. 2d 541; 128 P. 2d 63.
[8] *R. G. Hamilton Corp. v. Corum*, 218 Cal. 92; 21 P. 2d 413.
[9] *McCaughna v. Bilhorn*, 10 Cal. App. 2d 674; 52 P. 2d 1025.
[10] *Maguire v. Hibernia S. & L. Society*, 23 Cal. 2d 719; 146 P. 2d 673.
[11] *James v. Hall*, 88 Cal. App. 2d 528; 264 Pac. 516.
[12] *Wollenberg v. Tonningsen*, 8 Cal. App. 2d 722; 48 P. 2d 738.
[13] *San Diego v. Cuyamaca Water Co.*, 209 Cal. 105; 287 Pac. 475.
[14] *Columbia Pictures v. DeToth*, 26 Cal. 2d 753; 161 P. 2d 217.
[15] *Zimmer v. Gorelnik*, 42 Cal. App. 2d 440; 109 Pac. 34.
[16] *Wollenberg v. Tonningsen*, *supra*.

OUTLINE OF CERTAIN GUIDING PRINCIPLES IN THE DRAFTING OF WILLS

By Joseph H. Rose*

Jos. H. Rose

1. Insert clause revoking former Wills.
2. Direction to pay debts, etc. Can be omitted in the interests of brevity. Direction to pay taxes—specific provision should be made. See Par. 24.
3. Burial instructions. Testator may direct as to interment of his body (Henderson, 13 C. A. (2d) 449) and may bequeath his body or parts of it (20 P. C.; 7100 H. & S. Code).
4. Care of cemetery lot. Trust for perpetual care is invalid, contract by executor is valid (7101 H. & S. Code). Trust for masses is valid into perpetuity.
5. Declaration as to what persons constitute testator's family. Is informative only and may be omitted for brevity. Do not rely on mention of issue in this provision to prevent them from taking as pretermitted. Note also that Sec. 90 P. C. requires provision for issue living at date of death, not date of Will. (Todd, 17 C. (2d) 270.)
6. Recital as to character of property—separate, community. Many attorneys, for tax and other reasons, prefer not to have testator make any commitments on this point.
   a. If Will recites all property in names of spouses is community and wife signs election attached to Will, result is to throw joint tenancy assets into the estate. (Stack, 32 C. A. (2d) 586.) Similar language may throw wife's half of tenancy in common into estate.
   b. Companion or Joint Wills may have the same effect where such language is used. (Watkins, 16 C. (2d) 793.)
7. Election. Four property rights belong to wife and cannot be taken from her without her consent. These are (1) her half of community; (2) family allowance; (3) probate home-

*Mr. Rose is a member of the California bar and a graduate of Harvard Law School. He is Trust Counsel for the Security-First National Bank of Los Angeles.

stead; (4) property exempt from execution, including valuable interest in life insurance payable to the estate. In addition, Sec. 201.5 P. C. purportedly confers right on wife to Will certain of husband's separate estate. Wife is put to election where husband's Will attempts to deprive her of any of these rights. Wife may elect during husband's life or after his death. Unless she elects during life (by writing accompanying Will) the Will should provide where the property is to go if she elects to take against the Will.

8. Automobiles, jewelry, clothing, etc. Bequeath these to members of family so they will not pass, as part of the residue, in trust or to numerous residuary legatees. Gifts should *not* be contingent on surviving distribution.

9. Pecuniary Legacies. These are not "specific," and a provision referring to specific legacies, such as that they are given tax free, therefore does not apply to them.

10. Gifts contingent on surviving distribution.
    a. Avoid language making gift contingent on surviving *final* distribution.
    b. Gifts to a class (*e.g.*, to issue) contingent on surviving distribution, are void unless class must close within lives in being or 21 years. (Campbell, 38 C. A. (2d) 102.)
    c. When made to spouse, loss of marital deduction will result.
    d. Specific devise of real property—who receives the rents prior to distribution? (See Jameson, 93 C. A. (2d) 35.)

11. Effect of legatee predeceasing testator.
    If legatee is blood relative and leaves issue surviving testator. 92 P. C. will prevent lapse unless testator has shown contrary intent.

12. What language in gift to non-relative shows intent legacy shall not lapse if legatee predeceases testator.
    a. To A in fee simple—legacy lapses as language is not sufficient to show contrary intent.
    b. To A and his heirs—same. "Heirs" are "words of limitation."
    c. To A, his heirs, executors, administrators and assigns—same.

(Continued on page 267)

JUDICIAL DRAFTSMANSHIP

Charles A. Beardsley*

NINE years ago, when I was president of the American Bar Association, I said *out loud* what members of the bar had long been *whispering* throughout the country — I said that the judges of our appellate courts were casting an all-but-unbearable financial burden upon the lawyers, by steadily and unnecessarily increasing the length of their opinions — printed copies of which opinions the lawyers must buy and store, if they are to continue to practice law.

I did not then refer to any specific opinion; but I did point out that, on the average, the opinions are about six times as long as they were a century ago, and that, year by year, they are getting longer and longer.

I understand that this session of the Section on Judicial Administration is devoted to a consideration of the question as to whether anything *should* and *can* be done about it. I vote "aye" on the "should," and I vote "aye" on the "can."

WHAT SHOULD BE DONE

I take it that the invitation extended to me to speak to you today is in the nature of a request, if not a challenge, to explain, and if possible to justify, my vote on these two questions. In responding to this request—in meeting this challenge—necessarily, I shall be critical of your opinions. Nothing that I shall say, however, should be construed as indicative of disrespect. I shall try to make the criticism constructive. I hope it will not hurt. If it does, permit me to remind you that you have asked for it.

It has occurred to me that, on this occasion, instead of talking exclusively about opinions generally, I had better talk about some specific opinions—as illustrative of opinions generally.

As illustrative of the brief opinions of a century ago, I refer you to the opinion of the Supreme Court of California in a case I recently had occasion to cite: *Robinson v. Pioche*, 5 Cal. 460. Robinson fell into a hole in the sidewalk in front of Pioche's

*Of the Oakland Bar.

This address delivered by Mr. Beardsley before the Section on Judicial Administration of the American Bar Association in Seattle on September 6, 1948, resulted from agitation (particularly among members of the American Judiciary) that followed an address on the same subject delivered by Mr. Beardsley in Chicago on December 1, 1939. The first address was published in 24 LOS ANGELES BAR BULLETIN, 231 (April, 1949). The editors believe the second address, like the first, merits publication both for its content and engaging style.

store. When he sued Pioche for damages for his injuries, the evidence showed that, at the time of the fall, he was drunk. The trial court instructed the jury that, if his drunkenness contributed to his injuries, he could not recover. He didn't. He appealed. The opinion of the Supreme Court of California, by Mr. Justice Heydenfeldt, was only six lines long, as follows.

"The Court below erred in giving the third, fourth and fifth instructions. If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it.

"The judgment is reversed and the cause remanded."

Refreshing, isn't it?

I was somewhat uncertain as to where I should look for an example of a present day opinion—one to lay along side this six line California Supreme Court opinion of a century ago. I rejected the idea of using one of the recent opinions of the Supreme Court of California. I wasn't sure that any of the judges of that court would be here to defend themselves. And, besides and more important, my law firm practices regularly before that court; and I did not desire to cause any undue resentment that might work to the disadvantage of a client. The Supreme Court of Washington seemed to be the best prospect. Not only was it extremely unlikely that I shall ever have occasion to practice before that court, but also it was the court that was most likely to be well represented at this meeting—the court that was most likely to have judges here who could defend themselves, if it should appear to them that any defense is available.

But what opinion of the Supreme Court of Washington? In order to avoid the possible temptation to search for the most horrible example of a present day opinion, I decided to select it by chance—to take the last opinion of that court in the last Pacific Reporter advance sheet—whatever that opinion might be.

I took the then last advance sheet off the shelf—this was as of two months ago and I had not previously looked inside the cover—and I found that the last Washington case there reported was *Thilman v. Thilman*, 193 Pac. 2d 674.

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"COPYCATS," AND WITHOUT PUBLIC CONFUSION**

By John L. Martin*

THERE is a distinct feeling in the legal fraternity, as well as among laymen, that if the printed word is not copyrighted, it can be copied in its entirety with impunity. While a copyright is a means for preventing another from copying a person's literary product, it is not the only means. It is familiar that when a literary composition has not been published, there is a common law property right; once published and in the public domain, the originator loses his exclusive right of control, and generally the only remaining rights of the creator are those secured by the Federal copyright statutes.[1] The California Civil Code, sections 980-985, implements these basic concepts.

In the modern day, printed matter is generally copyrighted. In the absence of copyright, and after publication, may the originator or publisher still have rights? In a narrow class of cases, which in fields such as television might be expected to find fresh application, the courts have protected the originator despite the lack of copyright, and after publication. The key word is "competition."

In holding as early as 1902 that prior publication did not allow a competitor to pirate and distribute to its own patrons the work of another, it was said:

> "Is service like this to be outlawed? Is the enterprise of the great news agencies, or the independent enterprise of the great newspapers, or of the great telegraph and cable lines, to be denied appeal to the courts, against the inroads of the parasite, for no other reason than that the law, fashioned hitherto to fit the relations of authors and the public, cannot be made to fit the relations of the public and this dissimilar class of servants? Are we to fail our plain duty for mere lack of precedent? We choose, rather, to make precedent—one from which is eliminated, as immaterial, the law grown up around authorship—and we see no better way to start this precedent upon a career, than by affirming the order appealed from."[2]

---

*John L. Martin, of this Association, is a member of the BULLETIN Committee.

**In 25 LOS ANGELES BAR BULLETIN 133 (January 1950), Mr. C. G. Stratton wrote a short article entitled "Copycats," which in substance indicates that without patent, an imitative item so similar in design to a preexisting item, and which the public had come to look upon as the product of the prior manufacturer, may be controlled by the courts, in order that the public may not be misled or confused into thinking that the item was the product of the prior manufacturer. With a most respectful bow to Mr. Stratton, a quick variation of the problem is presented.

[1]34 Am. Jur. 407.

[2]*National Telephone News Co. v. Western Union* (7 C. C. A. 1902), 119 Fed. 294, at 300.

The United States Supreme Court in 1918 in the case of *International News Service v. Associated Press*[3] laid down the cardinal rule, criticized by some,[4] but by indirection given standing as late as 1936 by the same court.[5] In the I.N.S. case, the defendant was appropriating the news of its rival news agency, and in holding an injunction proper, it was said:

> "Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not, with special advantages to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."

There is a conflict of public policy inherent and apparent: On the one hand, legitimate businesses deserve protection from common piracy.[6] Contrariwise, information should be freely disseminated to the public. Thus in 1942 a Federal District Judge in a case[7] that dealt with the stealing of horse racing data, strongly, and with ardor, attacked the I.N.S. case, then did his duty and followed the case, saying:

> "I am persuaded that in view of defendants' prior record of infringement of plaintiffs' publications it would be unsound to allow defendants an exception from the injunction so that they might use plaintiffs' books for the limited purpose of getting clues to defendants' own material. Such an exception would make the injunction in practice unenforceable. In effect, it would place upon their honor defendants who necessarily rely upon minor sports writers chosen for qualities other than their capacity to make nice discriminations respecting the law of literary property. Decree for plaintiff in accordance with opinion."

---

[3]248 U. S. 215, 63 L. Ed. 211.
[4]Callman, Unfair Competition, Vol. I, page 725, Triangle case (*infra*).
[5]*Associated Press v. KVOS*, 299 U. S. 269, 81 L. Ed. 184.
[6]*Associated Press v. KVOS* (9 C. C. A. 1935), 80 Fed. 2d 575, at 579, 581.
[7]*Triangle Publications v. New England Newspaper Co.* (D. C. Mass., 1942), 46 Fed. Supp. 198.

Brothers-In-Law

By George Harnagel, Jr., Associate Editor

George Harnagel, Jr.

"COMPULSORY MEMBERSHIP in a Bar Association as a condition precedent to the right to practice one's profession," says an editorial in the *New Jersey Law Journal*, "is offensive and repugnant to lawyers." "Fiddlesticks," comments an editorial in *The Journal of the American Judicature Society* (in legal effect, but of course much more courteously than that).

* * *

Clarence M. Updegraff, Professor of Law at the State University of **Iowa**, has an article in the Fall 1950 issue of *Iowa Law Review* entitled: "A Half-Century of 'No Progress': Iowa's Obsolete Public Utility Statutes." A Note in the same issue pays its respects to the state's obsolete exemption laws. It remarks *inter alia* that: "The exemption of a portion of recent earnings would . . . be of benefit to a single woman, since today's white collar girl can take little solace from the present exemption of a sewing machine and $50 worth of poultry . . ."

* * *

The **Philadelphia** Bar Association is already making plans to celebrate its one hundred and fiftieth anniversary, on March 13, 1952. It was organized in 1802 as The Law Library Company, by members of the Philadelphia bar who "wanted a common meeting ground outside the railed area, and above all . . . wanted an arsenal of the gladiator's weapons—a library."

* * *

The **New York** State Bar Association provides its members with a legislative reporting service. It consists of a printed bulletin issued once a week during sessions of the state legislature for the purpose of analyzing the purpose, content and legislative position of bills of general importance to the legal profession.

Members of the **Colorado** Bar Association have received an exhaustive questionnaire from its Domestic Relations Committee. Typical questions, with the returns as tabulated to a recent date, follow:

Do you believe that common-law marriages should be abolished in Colorado?	Yes 158	No 273
Do you favor legislation making it a federal offense for a man to cross state lines to evade responsibility in supporting his children, even if such legislation would require an amendment to the U. S. Constitution?	Yes 306	No 125
Do you favor Colorado adopting an act to enforce support money payments entered by courts of other states when the supporting parent has become a resident of this state?	Yes 377	No 54
Do you believe in granting divorce decrees on the philosophy of diagnosis and therapy designed in each case for what is best for the family and society?	275	
or		
Do you believe we should continue the old system of guilt and punishment and the antagonistic divorce?	107	

* * *

The Executive Committee of the **Massachusetts** Bar Association has adopted the following resolution with respect to the political activity of judges:

> "For the purpose of maintaining the dignity of, and public confidence in, the courts of the Commonwealth and freeing them from affording a basis of adverse criticism, the Massachusetts Bar Association urges that no justice of any court of the Commonwealth engage in partisan political campaigns, either by way of running for office, serving on political or campaign committees, acting as a delegate, or otherwise

taking part in political conventions or engaging in like activities in such campaigns."

* * *

Bar Associations generally seem to be taking a healthy interest in such down-to-earth subjects as the fixing of fees, fee schedules, law office overhead and unlawful practice.

* * *

According to the report on "*The Reading Habits of the American Lawyer*," prepared for the Survey of the Legal Profession:

- *Time* is by far the most popular magazine with the profession.
- More lawyers read some law journal than magazines such as *Life*, *The Reader's Digest* and *The Saturday Evening Post*.
- Only 8.5% of the Bar are regular readers of drama, poetry, and books on art and music.
- 44% have read Churchill's "The Gathering Storm"; only 6%, Kinsey's "Sexual Behavior of the Human Male."

* * *

The **Boston** Bar Association sponsored a bill, now enacted into law, which makes picketing of courts unlawful in Massachusetts.

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Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of March, 1926, by A. Stevens Halsted, Jr., Associate Editor.

A. Stevens Halsted, Jr.

SEVENTY-NINE candidates out of a class of 120 who recently took the bar examinations here were successful. Among the new fledglings of the bar are: **George M. Devor, Paul R. Watkins, Leonard A. Deither, Thomas R. Dempsey, Chalmers L. McGaughey** and **C. P. Von Herzen.**

* * *

Premier Mussolini reviewed 50,000 black-shirts in Rome on Fascism's seventh birthday. Russia celebrated the ninth anniversary of the overthrow of Czarism by ceasing all work and holding parades. The usual crowds visited Lenin's tomb in Red Square.

* * *

Out of 135 attorneys considered for the appointments, Governor Richardson has named the following to places on the new Los Angeles Municipal Court: **Carl A. Stutsman, Raymond I. Turney, R. Morgan Galbreth, Douglas L. Edmonds, Henry M. Willis, Charles E. Haas, E. V. Rosenkranz, Myron Westover, Dailey S. Stafford** and **Charles B. MacCoy.**

* * *

At the April election, citizens of Los Angeles will vote on the following: (1) whether Sunday dancing should be permitted at the Venice pier, (2) a straw vote on public sentiment on the location (Plaza) and character of development (a union terminal) for the new railway terminal for Los Angeles, (3) whether Wilshire Boulevard should be zoned for business purposes, and (4) a straw vote on the plan to construct the new City Hall to a height of 430 feet.

For the first time after more than three years of experimentation, extended and successful conversations by telephone between New York and London have been held.

* * *

"Development of the lower Colorado River basin is an urgent necessity," urges Secretary of Commerce **Herbert Hoover.** He advocates that each of the six states involved enter into a compact to underwrite a $125,000,000 bond issue. Hoover says that "It is obvious that the national government could not be called upon to take on an enormous expense of this character without a contribution from the people of the southwest."

* * *

The U. S. Supreme Court in the **Robbins case** has ruled that income from California community property is taxable under the 1918 Revenue Act to the husband alone, and a husband and wife may not file separate returns, dividing the community income one-half to each spouse. In the decision, written by Mr. Justice Holmes, it was declared that the wife's

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interest in community property is a mere expectancy. Over $100,000,000 in income tax refunds is involved in this decision.

* * *

King Tut's coffin has been put in the State Museum at Cairo, Egypt; the mummy is being left in the tomb at Luxor.

* * *

The following slate of officers for the Los Angeles Bar Association for 1926-27 has been selected by the nominating committee: **Eugene Overton,** President; **Kemper Campbell,** Senior Vice President; **Hubert T. Morrow,** Junior Vice President; **R. H. F. Variel, Jr.,** Secretary; **T. W. Robinson,** Treasurer; **Norman A. Bailie, Guy R. Crump** and **Leonard B. Slosson,** Trustees. **Edward T. Bishop** served as chairman of the Nominating Committee.

* * *

Secretary of the Treasury **Andrew Mellon** testified before the Senate Finance Committee that the U. S. Government is paying off its public debt at the rate of $310,000,000 annually. According to present estimates, half of the $20,000,000,000 debt will be paid off by July 1, 1945, and the other half by foreign debt payments in 62 years if the payments are made.

* * *

Senator James Couzens, Republican Senator from Michigan, is appealing the government additional tax assessment of $10,909,588.08 in connection with his profits from the sale for $29,000,000 of his 2,180 shares in the Ford Motor Co. to Henry Ford. The Senator paid about $21 per share and sold for $13,300 per share. During the sixteen years he owned stock in the Ford Company, the Senator received dividends of approximately $6,000,000.

* * *

Attorney General **U. S. Webb** has ruled that repeating the Lord's Prayer from the King James version of the Bible every morning in the public schools is unlawful and unconstitutional.

* * *

A national contest is being held by radio and newspapers to find a word more truly descriptive of modern music than the word "JAZZ." Some suggestions are Wewfan, Peppo, Exilera, Syncodavis, Rhapsodoon, Paradisa, Syncosway, Glideola, Syncomelo, Jighop, Snappy de Snap and Hades Harmonies.

LANGUAGE FROM THE SUPREME COURT

Mr. Justice Jackson, dissenting in the case of *Estin v. Estin* (June 7, 1949), involving the extraterritorial effect of a divorce decree, said:

> "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom. Today many people who have simply lived in more than one state do not know, and the most learned lawyer cannot advise them with any confidence. The uncertainties that result are not merely technical, nor are they trivial; they affect fundamental rights and relations such as the lawfulness of their cohabitation, their children's legitimacy, their title to property, and even whether they are law-abiding persons or criminals. In a society as mobile and nomadic as ours, such uncertainties affect large numbers of people and create a social problem of some magnitude. It is therefore important that, whatever we do, we shall not add to the confusion. I think that this decision does just that."—J. L. M.

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JUDICIAL DRAFTSMANSHIP

(Continued from page 248)

The opinion is seventeen printed pages long—as compared with the six line opinion in *Robinson v. Pioche*. I searched for the reason for its great length. I found that there was no substantial conflict in the evidence. I also found that the case involved very few questions of law—the industrious editorial staff of the West Publishing Company could find material for only four paragraphs of syllabus in the seventeen pages.

What were these four legal questions, the decision as to which required seventeen printed pages? Were they new, doubtful or difficult? No.

Here they are:

1. The opinion of the trial judge, as to the competency of one whom he saw and heard testify, is entitled to great weight.

2. The evidence sustained the trial judge's finding of competency, there being no evidence of incompetency.

3. The evidence sustained the trial judge's finding that there was no undue influence, there being no evidence of undue influence.

4. A granted farm land to B, subject to A's life estate, in consideration of B's agreement to operate the farm, so long as he was physically able to do so, during A's lifetime; B's death in A's lifetime did not result in a partial failure of consideration, since the agreement expressly provided that it should not so result.

I have studied the seventeen page opinion carefully—I have read it at least a half dozen times. And I have found no other legal point decided therein—only these four simple and self-evident legal points.

Seventeen printed pages! Why is it so long? There are several reasons.

One reason is that the opinion cites, and quotes extensively from, the authorities in support of these self-evident legal propositions.

Another reason is that the opinion sets forth several legal descriptions of tracts of country lands—none of which descriptions has anything to do with the decision of the case.

Another reason is that the opinion quotes in full numerous

(Continued on page 260)

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pieces of documentary evidence, none of which, except a half dozen lines of one of them, has any pertinency whatever.

And, primarily, the great length is due to the detailed family history—the family history of the Thilman family. I shall quote illustrative portions of this history:

> "Mrs. Thilman had purchased two automobiles, one being used by Paul and the other by Francis. It is evident that Mrs. Thilman passed most of her time upon the farm; and she was a rather opinionated woman, and doubtless not particularly easy to get along with."
>
> As to the second generation, they raised "their own chickens and turkeys." "Francis and Myrtle were living on the farm in a made-over potato warehouse." "He was a hard-working farmer of limited education." "He and his wife raised and sold chickens and turkeys, and apparently lived most modestly." "Until about the time of his marriage to appellant, he was a somewhat indifferent farmer. After about 1930, however, as his mother grew older, Francis undoubtedly conducted the farm in a very efficient manner."
>
> "The two girls never married and lived secluded lives." "It appears from the evidence that these two women were, to say the least peculiar. They never associated with outsiders and would run, one witness said, 'like wild hares' from strangers. Apparently, they seldom, if ever, left the ranch; they dressed roughly, and worked hard on the farm."

I shall not quote more of the family history. Any one, who would like to read more of this history, may find several pages of it in the Pacific Reporter—a history, which we of the legal profession have bought and stored, and which the present and all future generations must continue to store as long as our civilization lasts.

I have taken the liberty of re-writing the opinion in *Thilman v. Thilman*. I believe that the re-written opinion adequately serves every purpose that could be served by an appellate court opinion in that case. It is as follows:

> The plaintiff, Margaret Thilman, deeded certain farm lands to her son, Francis Thilman. After Francis Thilman's death, this action was brought to set aside the deed, and contracts relating thereto, and to quiet title to the farm lands, upon three grounds (1) Margaret Thilman's alleged incompetency, (2) undue influence, and (3) partial failure of consideration.
>
> The Superior Court decided (1) that Margaret Thilman was competent, (2) that there was no undue influence, and (3) that there was a partial failure of consideration, by reason of which the defendant, Myrtle Thilman, the widow of Francis Thilman, must pay $5,350 to Margaret Thilman. Judgment was entered accordingly. The defendant appealed from the judgment; the plaintiffs cross-appealed. The questions presented for our decision are the propriety of the Superior Court's decision on these three points.
>
> There was no evidence presented in support of the claims that

Margaret Thilman was incompetent. All pertinent evidence indicated her competency. True, she was seventy-one years old; but, standing alone as it does, this fact has no tendency to impeach the trial court's finding. Furthermore the trial court saw and heard her testify, a fact which provides additional support for its finding of competency.

The finding that there was no undue influence is amply supported. In fact, there is no evidence to the contrary.

When Margaret Thilman deeded the farm to her son, she reserved a life estate in a 52 acre parcel, and required him to work the parcel, she agreeing to pay him $600 per year. The purported partial failure of consideration, and the consequent requirement of payment of $5,350, are based on the fact that the son predeceased the mother. But the contract did not impose upon the son the unqualified obligation to work the 52 acres as long as the mother lived, but only "so long as he is physically able" to do so; and it provided that, if during his mother's lifetime he should die, or become physically unable to work the farm, the only result would be that his $600 per year salary should cease, and that otherwise "this agreement nevertheless in all respects shall remain in full force and effect and be enforceable by the parties hereto, their heirs," etc. Obviously, therefore, the son's death did not result in any partial failure of consideration, since the parties expressly agreed that it should not so result, and the Superior Court erred in deciding that the son's widow must pay the $5,350.

The judgment is reversed, and the case is remanded to the Superior Court with instructions to dismiss plaintiff's action with prejudice, and to enter judgment quieting the title of the appellant, Myrtle Thilman, to the real estate described in the decree, subject only to the life estate of Margaret Thilman in the 52 acre parcel.

I have mimeographed copies of this re-written opinion. I would be glad if all of you, who are interested in this problem, would take a copy home with you, and compare it with the seventeen page opinion in 193 Pacific 2d 674. I doubt if any of you will feel anything has been omitted that is necessary, or even useful.

This re-written opinion is shorter. Its length is slightly less than four per cent of the length of the original—the original more than twenty-five times as long as the revision!

It is because of such things as this that, nine years ago, I raised the issue as to the cost to the American lawyers of buying and storing printed copies of unnecessarily long opinions.

Serious as is the problem presented by this cost, it is only a part, and probably a comparatively small part, of the problem.

It would be well for us to consider the waste of time—waste of time of the legal profession, present and future—resulting from these long opinions—the waste of time incident to court opinions that are twenty-five times longer than necessary, as is

this opinion in *Thilman v. Thilman*. This waste is apparent from many angles.

First, there is the waste of time of the draftsman—the time spent in drafting a twenty-five unit opinion, when a one unit opinion would serve all useful purposes.

Second, there is the waste of time of the other judges on the same court, who must read and comprehend twenty-five units instead of one unit in order to decide whether to concur or to dissent.

Third, there is the waste of time of the editorial staff of the law publishers who must read the twenty-five units in search of syllabus and digest material.

And, finally, and of the most far-reaching importance, there is the waste of time of every American lawyer, every American judge, and every American law student, who will ever have occasion to use that opinion in determining and applying the law as announced and applied therein. And that waste will continue as long as our civilization lasts.

It is impossible to measure accurately the cumulative effects of this waste.

In the first instance, as I have observed, there is the waste of time of the judges of the court that hands down the opinion. There are nine judges on the Supreme Court of Washington; besides the author of the opinion, there are eight other judges to read and comprehend the twenty-five unit opinion if the court sits *in banc;* three if in department.

How many judges of other courts, how many lawyers, and how many law students will be victims of the waste caused by this twenty-five unit opinion, nobody knows.

This much, however, we do know—this opinion is supposed to be useful to members of our American society, as long as our civilization lasts, and every member of that society, who is served by it, will pay twenty-five times as many units of time for the service as the service is worth.

The twenty-five to one is a low estimate. Actually, it will cost them more than twenty-five units, because a twenty-five unit opinion must be read several times before it is adequately understood. As I said before, I read the opinion in *Thilman v. Thilman* at least a half dozen times, before I was sure I understood

it. That raises the ratio, from twenty-five to one, to one hundred and fifty to one.

Maybe, that is too high, as applied to long opinions generally—I don't know. So suppose we leave it at twenty-five to one. That, we may be sure, is the absolute minimum. That, surely is bad enough.

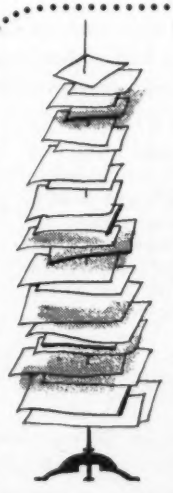
Time is mankind's most precious asset. It is limited. It is irreplaceable. When twenty-five units of time are consumed in doing something that could be better done in one unit, the loss is very, very heavy. The result to society is incomprehensible; it could be fatal.

Yes, I vote "aye" on the proposition that something *should* be done about the great length—the obviously unnecesary length—of judicial opinions.

WHAT CAN BE DONE

I now invite your attention to the second part of the question, on which I also voted "aye"—the question as to whether or not anything *can* be done about it.

(Continued on page 264)



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The first thing necessary is for our appellate court judges to become persuaded that something *should* be done about it—to stop trying to brush aside criticism by the observation (which I have heard on more than one occasion) that there is nothing to it, because "I never heard a lawyer complain about the court's *opinion*, if the *judgment* is in his favor"—an observation that obviously avoids the issue—an observation that merely indicates that, in a particular case in which he appears, the lawyer is more concerned with the *judgment* of the court than wtih its *opinion* in *that particular case*—a concern that has nothing whatever to do with his concern, or with his lack of concern, with the mass of opinions in cases in which he does not appear—opinions that he must use, in his service to his clients, as long as he practices law.

The judges can write shorter—much shorter—opinions, if they want to—if they will recognize the need, and apply themselves to meeting that need.

They can, if they will, leave out of their opinions numerous details that serve no useful purpose, such, for instance, as the long family history of the Thilman family.

They can announce long-established rules of law, without long citations or quotations of supporting authorities, and without long elaboration. If a judge desires to make the point that two plus two equals four, it is unnecessary to do it like this:

> If, by the use of that arithmetical formula known as addition, we desire to arrive at the sum of two added to two, we will find—and we make this statement boldly, without fear of successful contradiction—we repeat, by the use of that arithmetical formula hereinbefore mentioned, we shall find—and we take full responsibility for the statement we are about to make—that the sum of the given two added to the other two will be four.
>
> As some one has observed:
>
> "Another form of wastefulness is the expenditure of words beyond the income of ideas."

The judges can also shorten their opinions by curing themselves of the practice—a cure that many lawyers might also profitably take—of using several words to express a meaning that is better expressed in one word. This is a common prac-

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tice in opinion writing. Thus, in the opinion of *Thilman v. Thilman,* I note the following:

"last will and testament," meaning "will";
"vacating and setting aside," meaning "vacating";
"cancel and set aside," meaning "cancel";
"executed and delivered," meaning "executed";
"made and entered into," meaning "made";
"devising and bequeathing," meaning "giving";
"named and appointed," meaning "appointed";
"adjudged and decreed," meaning "decreed."

They can also shorten, and otherwise improve, their opinions by using simple language—words of one syllable in preference to words of two or more syllables—in preference to long and little known words commonly used by lawyers and judges.

I have heard the argument advanced that simple language cannot properly be used in the law, because law is a "learned science," and because "the higher the level of culture, the less plain and simple the language."

I dissent; and, in support of my dissent, I quote the following authorities:

LONGFELLOW: "In character, in manners, in style, in all things, the supreme excellence is simplicity";

EMERSON: "Nothing is more simple than greatness; indeed, to be simple, is to be great";

PHILIP J. BAILEY: "Simplicity is Nature's first step, the last of Art";

ST. PAUL, a truly venerable authority, in his first epistle to the Corinthians, chapter 14, 9th verse: "So likewise ye, except ye utter by the tongue words easy to be understood, how shall it be known what is spoken? for ye shall speak into the air."

The fact that law is a learned profession is no reason why, when what we mean is

"Twinkle, twinkle, little star,
How I wonder what you are,
Up above the world so high,
Like a diamond in the sky,"

we should write or say

"Scintillate, scintillate, globule vivific,
Fain would I fathom thy nature specific;
Loftily poised in ether capacious,
Strongly resembling a gem carbonaceous."

DRAFTING OF WILLS

(Continued from page 246)

d. To A *or* his heirs. No lapse. Heirs of A are substituted in his place.

e. To A or his estate. No lapse (Brunet, 34 C. (2d) 105).

13. General or Specific Character of Gift, depends on testator's intent.

a. Bequest of 100 shares of U. S. Steel—general, even though testator owns 100 shares. If stock not contained in estate at death executor must buy it.

b. Bequest of "my" 100 shares of U. S. Steel is specific.

c. Where stock is in close corporation different rules apply. (Buck, 32 C. (2d) 372.)

14. Consequences of making gift general or specific.

a. If specific, gift fails where testator does not own the subject matter at death.

b. If specific, rents, interest and dividends during probate go to recipient.

c. If general, executor must purchase the subject matter if testator does not own it at death. (Jones, 60 C. A. (2d) 795.)

15. Exoneration. If subject matter of specific devise or bequest is subject to encumbrance securing money borrowed by testator, executor must pay this off out of residue unless Will provides otherwise.

16. Powers of appointment. Residuary clause will generally exercise power to appoint by Will owned by testator. (125 P. C.) If testator owns any such power draftsman should examine instrument creating it. It may be wise not to exercise the power and to let the property go to the takers in default. Various important tax, perpetuity and other matters may be involved. For detailed analysis see Casner in 64 Harv. L. Rev. 185.

17. Residuary Clause. Where residue is left in trust beneficiary gets income from date of death. (Estate of Platt, 21 C. 2d 343.) Testator may wish to negative this, but should not do so where marital deduction is desired.

a. Procedure for calculation of income under Platt rule

has never been laid down by California Courts. For various possible rules see Scott on Trusts, Sec. 234.4.

b. Note rule of Platt case that unless otherwise provided beneficiary receives not only income during administration but 4% interest thereon.

c. Note peculiar rule where only a portion of residue is left in trust. (See Scott, Sec. 234.5 and *cf.* Schiffman, 86 C. A. (2d) 649.)

18. Distribution clauses in testamentary trust. These are the most important and difficult part of the attorney's job. Any one of the various form books in use may be valuable time savers. A few suggestions are:

a. Consider the creation of shares where there is more than one beneficiary, *e.g.*, where the trust continues for children after the wife's death. This is a draftsman's device, the use of which often simplifies his problem of expression.

b. Generally provide for the use of principal of a beneficiary's share if the income of the trust is not sufficient for his reasonable support, care, comfort, and education, or, more restricted, for his needs in case of illness or accident.

c. Provide for payment of last illness and burial expenses of beneficiary who has no outside estate.

d. Consider creation of a separate trust for each of several beneficiaries on account of income tax advantage in case of capital gains.

e. Provisions for issue.

1. Specify whether word "issue" or similar word includes issue by adoption.
2. Word "issue" should not be used to mean children, but as synonymous with descendants.
3. Gift in remainder to issue should specify that "then living" issue, *i.e.*, those living at life's tenant's death, are to take.
4. Gifts to issue should provide whether they take *per stirpes* or per capita.

f. Perpetuities and Restraints. Only safe general rule is to take care that the trust may not by any possibility

continue beyond lives in being. So-called "safety-clause," specifically so providing, is wise precaution in every trust. If the trust is measured by a term of years seems 21 years is maximum. (See 37 Cal. L. Rev. 510.)

1. Remainders should not be to persons unborn at testator's death who are living at *distribution* of trust estate (Campbell, 28 C. A. (2d) 102), but at date of event which terminates the trust.

19. Spendthrift provision. Seems desirable to include in every trust. However, Sec. 859 C. C. probably accomplishes the same result so far as creditors are concerned, though it does not prevent assignment.

20. Powers of Trustee. These should be set forth in detail. Blanket provision that Trustee is to have all the powers testator had over the property in his lifetime is probably not sufficient. Short and long forms of trust powers are available in the various form books in common use. Note the following:

   a. Prudent man rule re retention and investment is set forth at 2261 C. C.
   b. Bank Act confers power on corporate, not individual, trustees to use nominee.
   c. Trustees may give proxies on corporate stock. (Sec. 2270 C. C.)
   d. Respective rights of life tenant and remaindermen to trust receipts and the matter of what expenses should be charged to income or principal are pretty well covered by Principal and Income Act, Act 8696 General Laws. So also is the matter of apportionment on death of a life tenant.
   e. Where marital deduction is desired, care should be taken not to include any trustee powers which will cause it to be lost. In general see Reg. 105, Sec. 81.47.

21. Payments to beneficiary under disability. To avoid guardianship it may be wise to include a blanket clause that the Trustee may make payments to or *for the benefit of* a beneficiary, or may pay to his parent, etc.

22. Provision that "Except as provided in this Will I have inten-

tionally and with full knowledge omitted to provide for my heirs."

a. This prevents children and issue of deceased children, not mentioned in Will, from taking under Sec. 90 P. C., but a better way is to disinherit them specifically.

b. It may be dangerous, as where testator leaves estates to children A and B and has or adopts child C after Will, since C is then cut out. (Lombard, 16 C. A. (2d) 526.)

c. It has little if any effect as to persons other than descendants, as no other persons have a legal right to share in the estate merely because they are not mentioned in the Will.

d. It does not prevent spouse from taking under 70 P. C. where testator marries after date of Will. (Axcelrod, 23 C. (2d) 761.)

e. It does not prevent issue of a deceased relative from taking under Sec. 92 P. C.

f. It does not prevent an heir from succeeding to property not disposed of by the Will.

23. Contest Clause. Disinheritance of heirs who contest the Will may not be sufficient to prevent the heirs from succeeding by intestacy to what they have lost through the contest clause. To accomplish this provide who is to take the share of a legatee who forfeits through a contest.

a. Contest clause may be a pitfall for the unwary. Legatee may forfeit his interest by merely participating in a friendly suit. (Howard, 68 C. A. (2d) 9.)

24. Tax Provisions. Inheritance taxes are charged to the beneficiaries who take outright gifts but taxes on interests of trust beneficiaries are charged to trust corpus. (Secs. 14121-2 R. & T. Code.) Same rule applies in general as to federal estate taxes. (Secs. 970-7 P. C.)

So also, the executor is required to collect from a person who takes nothing under the Will (*e.g.*, joint tenant, donee, trustee under living trust, life insurance beneficiary) his share of such taxes. Difficulty of collection especially where such person resides out of the jurisdiction, may make it desirable to provide in Will that all such taxes be paid out of residue.

a. Provision that "inheritance taxes" be paid out of resi-

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due probably does not cover estate taxes (Hotaling, 74 C. A. (2d) 898).

b. Mere direction to executor to pay taxes is not equivalent to a direction to pay them out of the residue, and does not abrogate Sec. 970, etc.

c. There is no one safe standard tax clause. Desires of each testator as to where taxes are to fall, and other practical problems, must be considered in each case.

25. Appointment of Executor. If executor is individual, great majority of states permit him to act there, whether or not he is a resident, though he may have to go to the State to qualify. Corporate Executors can act only in those States where they have qualified to carry on a trust business. Some States prohibit them from qualifying.

a. Foreign trust companies are prohibited from acting as executor or trustee in California.

b. The California probate court will not distribute to a foreign corporation as testamentary trustee.

c. Testator should name an executor to act in every State in which he has assets.

ELECTION OR WAIVER BY WIFE

1. To put wife to election husband's Will must purport to dispose of property which he cannot dispose of without her consent. She may then elect to take what the law gives her or to take what his Will gives her.
2. A husband who purports to dispose of the entire community will wish to make it clear whether he also purports to deprive the wife of family allowance, probate homestead or property exempt from execution. He may also wish to put her to an election as to Sec. 201.5 community.
3. If wife signs election attached to Will it should provide method by which she can revoke it during his life. Provision that husband can revoke Will appears unnecessary. If he revokes or changes it without her consent it seems that she is released from her election.
4. Wife should generally have independent legal advice in signing election (Gaines v. Trust Co., 48 C. A. (2d) 709).
5. If wife signs election in husband's lifetime does this cause all community to be subject to federal estate taxes on husband's

death? Government has never so contended. Does it involve payment of a gift tax by wife when husband dies? Query.

WILL OF MARRIED WOMAN

1. Her testamentary power. Wife may dispose of her separate estate, half of community acquired since August 16, 1923, and if Sec. 201.5 is valid, half of all husband's personal property earned by him during marriage is a separate property State.
2. Interference with husband's business. If business is community, a Will by the wife covering her half of the community and vesting it in children or others may be disastrous to him. For complications where his business is a partnership see Mullen in L. A. Bar Journal for August, 1949.
3. Probating wife's half of community. Provision in wife's Will that community shall "belong to" the husband, or provision whereby she refrains from disposing of it may enable him to succeed to it without administration (202 P. C.) and is preferable to a specific disposition in his favor.
4. Husband's liability for wife's last illness and burial expenses. If the wife wants to lift the responsibility for these from the husbanl, something more specific is required in her Will than a mere direction that her executor may pay her "debts."

GIFTS TO CHARITY UNDER SEC. 41 P. C.

1. Since 1943 amendment it is possible for a testator to give as much of his estate to charity as he desires regardless of what relatives he leaves, and how long he survives after date of Will. But this can only be accomplished if the Will is drafted in a certain way. (Davis, 74 C. A. (2d) 357; Haines, 76 C. A. (2d) 673.) Similarly, there is no limit to how much can be given to charity at termination of a testamentary trust, if the Will is properly drawn.

TESTAMENTARY GIFT TO LIVING TRUST

1. In Wells Fargo Bank v. Superior Court, 32 C. (2d) 1, it was held that assets distributed by probate court to a living trust were no longer subject to the jurisdiction of that court. It is questionable whether this case, which arose after the decree of distribution had become final, disposes of all of the uncertainties existing in this situation. (See Scott on Trusts, Sec. 54.3; Nossaman on Trusts, Sec. 105.)

DECLARATORY RELIEF

(Continued from page 244)

versy relating to the legal rights and duties of the respective parties and requests that these rights and duties be adjudicated by the court.[17] The question, whether a pleading alleges a cause of action for declaratory relief, is to be resolved by reference to the pleaded facts rather than the title or prayer for relief.[18]

It is not enough that the facts alleged indicate that a controversy may arise at some future date. The controversy must exist at the time the action is brought.[19] However, relief may be granted where there is a present dispute over future rights which may or may not come into being at a later date, depending upon the happening of some event. An example of this situation is a present dispute between two contingent remaindermen.[20]

That a breach of obligation has occurred and that a party has therefore an accrued cause of action does not of itself limit the party's right to declaratory relief.[21] But a complaint does not measure up to the requirements of an action for declaratory relief where all of the acts complained of were concluded prior to the comencement of the suit, and the relief sought is for the court to review them and declare that the plaintiff is entitled to a certain sum of money.[22]

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[17] *Lord v. Garland*, 27 Cal. 2d 840; 168 P. 2d 5.
[18] *Standard Brands of California v. Bryce*, 1 Cal. 2d 718; 37 P. 2d 446.
[19] *Merkley v. Merkley*, 12 Cal. 2d 543; 86 P. 2d 89.
[20] *Caldwell v. Rosenberg*, 47 Cal. App. 2d 143; 117 P. 2d 366.
[21] *Tolle v. Struve*, 124 Cal. App. 263; 12 P. 2d 61.
[22] *Orloff v. Metropolitan Trust Co.*, 17 Cal. 2d 484; 110 P. 2d 396.

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A complaint may be sufficient as against a general demurrer even though it may appear from the facts alleged that plaintiff would not be entitled to a favorable declaration.[23]

EXISTENCE OF OTHER REMEDIES

The remedy of declaratory relief is cumulative and is not affected by the existence of other remedies. C. C. P. 1062 provides:

> "The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts."

Thus a party may seek a declaratory judgment despite the fact that he could state a cause of action for, let us say, breach of contract or for an accounting.

It has become increasingly common for the plaintiff to seek both coercive and declaratory relief in one action, since C. C. P. 1060 provides that ". . . he (the applicant) may ask for a declaration of rights or duties either alone or with other relief; and the court may make a binding declaration of such rights and duties whether or not further relief is or could be claimed at the time. . . ." For example: A lessor may seek a money judgment for accrued rental and a declaration of the rights and duties of the parties to a lease.[24]

JURISDICTION OF COURTS

An action for declaratory relief is exclusively within the jurisdiction of the Superior Court.[25]

Where the plaintiff states a good cause of action for declaratory relief, and in addition seeks a money judgment for less than $3,000, the Superior Court will retain jurisdiction of the case and will determine the issues as to the money award sought by plaintiff, even though the amount sought is less than the limit of its jurisdiction in actions at law, and even though it may refuse to grant declaratory relief pursuant to its discretionary powers under C. C. P. 1061. The Municipal Court has no jurisdiction of a case if the complaint states a good cause of action for declaratory

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[23]*Photochart v. Del Riccio*, 94 Cal. App. 2d 315.
[24]*Tolle v. Struve*, 124 Cal. App. 263; 12 P. 2d 61; and *Columbia Pictures v. DeToth*, 26 Cal. 2d 753; 161 P. 2d 217.
[25]C. C. P. 1060.

relief, even though the amount sought is less than $3,000, and any judgment awarded in such case is void.[26]

PREFERENTIAL SETTING ON TRIAL CALENDAR

As previously stated, declaratory relief has for its purpose a liquidation of doubt with respect to uncertainties or controversies which might otherwise result in subsequent litigation. To effect this goal it was necessary to provide for speedy hearing of declaratory relief actions. C. C. P. 1062-a was therefore enacted:

> "Actions brought under the provisions of this chapter shall be set for trial at the earliest possible date and shall take precedence over all other cases except older matters of the same character and matters to which special precedence may be given by law."

At the present time an ordinary action may be set for trial in the Superior Court of Los Angeles County within approximately nine months from the date of filing the Memorandum for Setting. An action for declaratory relief may be set within approximately three months. Thus a plaintiff may, by framing his cause of action for a declaratory judgment rather than casting it in the conventional form, obtain an early trial date. However, the court may invoke its discretionary power and refuse to entertain the action if it regards as fictitious the issues tendered to sustain the case for declaratory relief.[27]

TIME FOR INSTITUTION OF PROCEEDING

The statute of limitations applicable to a particular action for declaratory relief does not begin to run against the right to maintain the action for declaratory relief until an actual controversy has accrued.[28] Thus the statute begins to run only from the time the defendant indicates a denial of plaintiff's claim to the rights in controversy, but "the period of limitations applicable to ordinary actions at law and and suits in equity should be applied in like manner to actions for declaratory relief. Thus, if declaratory relief is sought with reference to an obligation which has been breached and the right to commence an action for 'coercive' relief upon the cause of action arising therefrom is barred by the statute, the right to declaratory relief is likewise barred."[29] As in any other equitable action, laches is a defense

[26] *Cook v. Winklepleck*, 16 Cal. App. 2d Supp. 759; 59 P. 2d 463.
[27] *Kessloff v. Pearson*, 101 A. C. A. 900.
[28] *Salada Beach Public Util. Dist. v. Anderson*, 50 Cal. App. 2d 306; 123 P. 2d 86.
[29] *Maguire v. Hibernia S. & L. Society*, 23 Cal. 2d 719; 146 P. 2d 673.

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in an action for declaratory relief, but time will not begin to run in favor of the defendant until an actual controversy arises.[30]

DISCRETIONARY POWER OF THE TRIAL COURT TO REFUSE DECLARATORY RELIEF

The language of C. C. P. 1060 is very broad, with few limitations or restrictions upon the use of the declaratory action. Instead of such restrictions, the legislature, in C. C. P. 1061, said:

> "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

As has been pointed out, a party may not be denied declaratory relief solely because there is available to him another remedy; nor solely because he may not be entitled to a favorable declaration; nor because his cause of action has already accrued. In exercising this discretionary power, the court must consider several factors. Whether a cause of action otherwise may have accrued and whether other adequate relief may be available to plaintiff at the time, are factors to be considered by the court. ". . . All [authorities] agree that before a court may properly exercise its discretion to refuse relief on that ground [alternative remedies], it must clearly appear that the asserted alternative remedies are available to the plaintiff and that they are speedy and adequate, or as well suited to the plaintiff's needs as declaratory relief."[31]

Thus, although the existence of another remedy does not bar declaratory relief, the availability of alternative remedies is an important factor to be considered by the trial court in deciding whether declaratory relief should be granted.

The most recent judicial expression on the trial court's discretionary power under C. C. P. 1061 is to be found in the case of *Kessloff v. Pearson,* 101 A. C. A. 900. In this case, plaintiff sought declaratory relief although the allegations of his complaint disclosed an accrued cause of action for an accounting. The trial court sustained defendants' objection to the introduction of evidence, stating that plaintiff did not state a cause of action for declaratory relief because plaintiff had an accrued cause of

[30] *Toomey v. Toomey,* 13 Cal. 2d 317; 89 P. 2d 634.
[31] *Maguire v. Hibernia S. & L. Society,* 23 Cal. 2d 719; 146 P. 2d 673.

action for an accounting and there were no rights to be determined other than the amount of money to which plaintiff might be entitled. On appeal from the judgment of dismissal, plaintiff argued that since his complaint disclosed the existence of an actual controversy regarding the rights and obligations of the parties under a written contract and since plaintiff was entitled to *some* relief on the basis of the complaint, the trial court was without discretion to refuse to declare the rights of the parties. Plaintiff (appellant) relied upon the following statement in *Lord v. Garland*, 27 Cal. 2d 840, 852:

> "However, it is equally true that section 1061 of the Code of Civil Procedure, which allows the trial court to refuse to render a declaratory judgment, does not apply where, upon the facts stated, the plaintiff is entitled to some relief in connection with the matter which occasioned the controversy."

The District Court of Appeal, through the Honorable Clarence M. Hanson, Judge, affirmed the trial court and answered appellant's argument in the following language:

> "There remains for consideration the further contention of appellant that his complaint stated a cause of action for some equitable relief, *i.e.*, accounting, and hence the court erred in dismissing the action. Appellant cites Lord v. Garland, 27 Cal. 2d 840, as so holding and subsequent cases which quote or refer to it. We do not understand that the Supreme Court by the language it used in the Lord case intended to hold that a trial court could not dismiss an action if it stated or presented no cause for *declaratory relief* even though it stated a cause for some other relief. . . . [But] where a plaintiff states a cause of action for breach of contract or for an accounting or for any other like action, and demands declaratory relief, the court is not compelled to render a declaratory judgment simply because plaintiff is entitled to *some relief* under the cause of action stated other than for declaratory relief. If appellant's interpretation of the Lord case is correct, then Section 1061 of the Code of Civil Procedure has no meaning because the discretionary power of the court could be taken from it by the simple expedient of casting a cause of action of the conventional type in the form of an action for declaratory relief."

In answer to appellant's contention that because he had stated a cause of action for an accounting he was entitled to be heard on the issues tendered, the court in the *Kessloff* case stated (101 A. C. A. at 908):

> "If, as appellant contends, the complaint stated sufficient facts for the remedy of an accounting or any other conventional remedy, he nevertheless failed to preserve any such right. When the court announced he would not entertain the case for a declaratory judgment, appellant was certainly under a duty to move that the case be entertained for the purpose of showing he was entitled to an accounting. As the appellant was adamant in his insistence that he was entitled to a declaratory judgment, the court in view of its ruling and for want of any further motion on appellant's part had no alternative except to dismiss the case."

REVIEW BY APPELLATE COURT

A judgment refusing to entertain a complaint for declaratory relief is not reviewable upon appeal except for an abuse of discretion.[32]

It is the duty of appellant to present a record which shows that relief was improperly refused, and in the absence of a showing to the contrary, the appellate court must assume that the trial court properly exercised its discretion.[33]

Refusal to grant relief has been held not to be an abuse of discretion by the fact that the applicant had available another remedy, by action at law or suit in equity[34] or by means of a statutory proceeding.[35] But the mere existence of a remedy established by statute or otherwise does not necessarily justify dismissal of an action for declaratory relief.

In the last analysis, there is no hard and fast rule for determining when a trial court should or should not entertain an action for declaratory relief,—the principle which seems to guide the appellate courts is that the trial court does not have discretion to refuse to render a declaratory judgment where the complaint sets forth facts and circumstances showing that a declaratory judgment is necessary and proper.

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[32] *Orloff v. Metropolitan Trust Co.*, 17 Cal. 2d 484; 110 P. 2d 396.
[33] *Sunset Scavenger Corp. v. Oddou*, 11 Cal. App. 2d 92.
[34] *Welfare Investment Co. v. Stowell*, 132 Cal. App. 275; 22 P. 2d 529.
[35] *Communist Party v. Peek*, 20 Cal. 2d 536; 127 P. 2d 889.